No. 00-1494

Supreme Court, U.S.
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In The
Supreme Court of the United States

BALTIMORE RAVENS, INCORPORATED; NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,

Petitioners,

v.

FREDERICK E. BOUCHAT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition

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STATEMENT OF THE CASE

The district court bifurcated this case between liability and damages.[1] After a five-week trial on liability and the denial of post-trial motions, this case was appealed on questions certified by the district court at the request of the petitioners, including the principal question of whether Respondent's "proof of a reasonable possibility of access [was] legally insufficient." Pet. App. 61a.

STATEMENT OF FACTS

Respondent supplements the statement of facts set forth in the Court of Appeals opinion (Pet. App. 2a-7a) as follows:

Overwhelming evidence presented at trial corroborated Bouchat's testimony that he created his Ravens shield design (Pet. App. 69a) around December 5, 1995, six months before petitioners released their designs to the public. Among the various witnesses who testified that they saw Bouchat's design in or around December 1995 were a Deputy Secretary of the Maryland Department of Labor, Licensing and Regulation; Assistant Attorneys General; Public Information officers; fraud investigators; and other responsible public servants who worked in the building where Bouchat was employed as a security guard. JA. 41-47, 50-53, 62-63, 82-83, 126, 130-33, 226-29, 236-37, 246-48, 380-81, 561-62.[2] Many of these witnesses also testified that they saw Bouchat's preliminary designs and witnessed their progression toward his final shield design (Pet. App. 69a) of December 5, 1995. JA. 113-15, 248, 262-69, 373-75, 377-78, 1339, 1342. Bouchat introduced his work-in-progress into evidence and described in detail the

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[1] The damages portion of the case remained stayed until February 6, 2001. Discovery has just recently begun on damages.

[2] "JA" refers to the Joint Appendix in the Court of Appeals.

process by which he developed his final design (Pet. App. 69a). JA. 463-75. Part of his work-in-progress is what the petitioners refer to as the "Garrett drawing" (Pet. App. 67a), one of several drawings that pre-dated the final shield design. Pet. App. 69a.

An Assistant Attorney General of the State of Maryland testified that he told Bouchat in mid-December 1995 to put a © on his works and date them. JA. 476-77, Tr. 458-61. On December 21, 1995, Bouchat gave an individual who worked in his building a copy of his final shield design on which he made the notation, "Merry Christmas Russ 12-21-95". JA. 282-84, 476-77, 1336. That copy was introduced in evidence as Plaintiff's trial exhibit 1, which is displayed below and attached hereto as a Supplemental Exhibit. *See* Res. App. 1a.

Bouchat Christmas Gift to Russ, December 21, 1995

Around Christmas 1995, Bouchat also gave a copy of the same exact drawing (Plaintiff's trial exhibit 2) to a manager of a

nearby garage. Pet. App. 69a; JA. 302-08, 1337-38. Other witnesses testified that Bouchat had this exact design prior to the end of December 1995.[3] JA. 176-77, 185, 226-29, 236-37, 380-81. Bouchat's Ravens artwork led Eugene Conti, Secretary of the Maryland Department of Labor, Licensing and Regulation, to arrange a surprise meeting with MSA Chairman John Moag on March 28, 1996, the day before the new team and the MSA jointly announced that the team would be called the Baltimore Ravens.[4]

Bouchat's testimony that Moag invited him to fax Moag his Ravens drawings was corroborated by the State Public Information Officer who was present at the meeting and took photographs. JA. 69-70, 72-73. Bouchat's testimony that he had faxed his work to Moag at Moag's invitation was corroborated by his immediate supervisor, Jan Drabeck, who testified that Bouchat had obtained permission from the head of General Services to use the fax machine for the purpose of sending his drawings to MSA, because Moag had expressed an interest in Bouchat's artwork. Approximately two weeks later, Bouchat confirmed to Drabeck that he had sent his drawings to Moag. JA. 332. Additionally, Richard Feller, a management employee working in the same building, testified that Bouchat told him at the time that he was going to send his drawings to Moag. JA. 1058-59.

John Moag, as Chairman of MSA, had an unusually close relationship with the Ravens during the precise period when Bouchat faxed his works to MSA, the same period when NFLP designers were just beginning their preliminary work on

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[3]Others working in the building testified they saw this exact work some time before public announcement of the team's name on March 29, 1996; and, still others testified they saw it well in advance of the public unveiling of the Ravens logo in June 1996.

[4]Moag told Bouchat at the meeting that the team would be called the Baltimore Ravens.

the Ravens' logo project. Moag, as MSA Chairman, had been instrumental in negotiating and inducing the team to leave Cleveland by putting together an attractive financial package consisting in part of a new downtown Baltimore football stadium. During March and April 1996, since the team did not yet have its own office, Moag and his law firm provided the new team temporary space in their Pratt Street office rent-free. Moag's office was located in the main part of the office in close proximity to that of David Modell, the team vice-president, and other Ravens personnel. Moag testified that his office was on the same floor as Modell's and within earshot. Modell and the team had use of, and access to, the entire suite and used the law firm's telephone system, as well as its photocopy, fax and postage machines located in its work room. Modell and the team used the services of the law firm's receptionist and internal mail and fax delivery personnel. David Modell was a gregarious individual, who socialized with Moag and his secretary in the office; and team personnel shared the lunch room in the suite with the law firm's employees. JA. 392-400, 956-57, 963-64, 976, 979, 1512.

MSA offices, which are located in the Warehouse at Camden Yards, a little more than a block away from Moag's law office, acted as a mail drop and fax reception facility for the team, since it did not have its own address. MSA received mail and faxes for the Modells, the team and Moag. MSA personnel typically would sort and open any mail addressed to Moag, Modell or the team and deliver that mail to the law firm's front desk where it was sorted by the receptionist and distributed by internal messenger to Moag, Modell or the team. Likewise, the law firm's personnel in the photocopy room received faxes as they arrived and distributed them to the appropriate persons within the law firm or the new team. The evidence at trial specifically established that MSA personnel signed postal return receipts on behalf of the Modells and the team for mail containing proposed artwork submitted by the public, and they forwarded that artwork on to the Pratt Street

office. Bouchat introduced into evidence artwork that had flowed from members of the public to MSA at Camden Yards, to the law office suite shared by Moag, Modell and the team, and then on to NFLP. JA. 317-20, 394, 400, 704-05, 956-57, 976, 1040, 1577-81, 1587-88.

David Modell contributed creative ideas and provided artistic and managerial direction to the NFLP design team. Modell had overall supervision and control of the logo development process. JA. 348-49, 352, 365, 845, 850, 859-60, 880-81, 1068-69, 1074, 1075, 1076-77, 1080, 1094, 1512-18. On April 8, 1996, a week after Bouchat faxed Moag his Ravens drawings, Modell used the law firm's fax cover sheets for transmission of managerial directives concerning the logo project to NFLP in New York.[5] JA. 1572-76.

As the trial exhibits tellingly demonstrate, Bouchat's and the petitioners' works were strikingly similar. Moreover, they shared common mistakes not found in the public domain or anywhere else. Petitioners' own expert testified that the raven in the respective shield designs did not resemble a real bird, i.e., was fanciful. Both ravens had feet that were the digging claws of a mammal, such as a bear or badger, and contained the very same ornithological errors in proportion, wing shape, notches and number of wing feathers and slots. JA. 1654-60, 1665-66, 1668-75. These mistakes did not have sources within petitioners' research materials. JA. 745-46, 783-84, 1556-57. Some of petitioners' internal work product that was not made public, so that Bouchat could not have had access to it, contained the same mistakes found in the tail feathers of Bouchat's shield design. JA. 1339, 1342, 1343, 1650, 2250. Further, the stylistic typography of the letter B departed from the type used by professional designers in its top-heavy shape. JA. 142-43.

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[5]The Ravens and the Modell family, along with the other NFL teams and owners, own NFLP and have assigned their interest in their trademarks or logos to NFLP. JA. 355-62, 876.

According to the experts for both sides, Bouchat's drawing and petitioners' logo involve over 20 separate design elements, all of which are virtually identical and are identical in their total selection, coordination and arrangement. The experts for both sides thus concluded that the two works could not have been created independently of each other and, therefore, someone copied. Although petitioners offered their expert testimony in an effort to prove that Bouchat had copied the Ravens' logo, the district court concluded expressly that the jury reasonably inferred that it was petitioners who had copied, given the overwhelming evidence of Bouchat's prior creation and the substantial evidence supporting a reasonable possibility of access. Pet. App. 52a.

REASONS WHY THE WRIT SHOULD BE DENIED

A. THE CASE INVOLVES A FACT-DRIVEN APPLICATION OF PROPERLY STATED RULES OF LAW TO THE EVIDENCE

The Petition should be denied because the judgment affirmed in this case was driven by the jury's evaluation of facts and circumstances proved at trial and does not hinge upon a rule or decision of law, much less a question worthy of this Court's attention. Independent of the striking similarity of the two works, evidence supporting a finding of access included the close working and social relationships of the intermediaries during the relevant time period, Bouchat's admitted meeting with Moag, the practice of Moag's office of routing in-coming mail and faxes to Modell and Modell's personal involvement and supervision of the logo design process. Moreover, petitioners' own experts conceded that the two works could not have been created independently of each other. Coupled with the strength of Bouchat's prior creation evidence (which petitioners discount in their petition), this evidence fully supported the jury's finding that there was a reasonable

possibility of access. Succinctly stated, the Petition is an attempt to create a conflict among the Courts of Appeals and with the decisions of this Court on a rule of law, when none exists. What this case really is about is the question whether the district court and the Court of Appeals, both of which reviewed the extensive record in this case,[6] misapplied properly stated and universally accepted rules of law to the evidence in determining whether Bouchat presented sufficient evidence from which a reasonable fact finder could conclude that there was a reasonable possibility of access.

Direct evidence of copying is seldom available to a plaintiff in an infringement controversy. For that reason, the courts of appeals have universally accepted circumstantial evidence to create a **presumption** and a *prima facie* case of copying. To raise this **presumption** and establish a *prima facie* case, a plaintiff must show that (1) plaintiff's and defendants' works were substantially similar, and (2) there was a reasonable possibility that defendants had access to plaintiff's work. *E.g., Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2nd Cir. 1988)("copiers are rarely caught red-handed"); *Towler v. Sayles*, 76 F.3d 579, 581-82 (4th Cir. 1996); *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978); *Selle v. Gibb*, 741 F.2d 896, 900-901 (7th Cir.1984); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *Autoskill, Inc. v. National Educational Support Sys., Inc.*, 994 F.2d 1476, 1490 (10th Cir. 1993). These cases generally stand for the proposition that a reasonable possibility of access means that it was "reasonably possible that the paths of the infringer and the infringed work crossed" or that the infringer had a "reasonable opportunity to view" it. *E.g., Towler*, 76 F.3d at 582. By contrast, "[a] mere possibility that such an opportunity could have arisen will not suffice." *Id.* But once

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[6] Approximately 484 exhibits were admitted into evidence at trial. The Joint Appendix in the Court of Appeals included 3329 pages.

the presumption of copying arises in a plaintiff's favor, it does not vanish upon the defendants' introduction of contradictory evidence and is deemed sufficient to generate a jury question whether defendants copied. *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065-66 (4th Cir.1988).

Even under the Fourth Circuit decision in *Towler,* upon which petitioners rely, *see* Pet. at 21-22, a reasonable possibility of access does not require direct evidence of viewing, and it may be proved through circumstantial evidence. *Id.* at 581-83. Moreover, plaintiff need not prove a chain of custody establishing that the infringed-upon work was passed from one person to another in the channel of communication to the actual copier. *Id.* Rather, a "court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer." *Towler*, at 583. *Towler* instructs that there must be concurrent "contact" between those in the channel through which the work flowed during the same period, and the dealings between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access. *Id.* at 583. Bouchat amply met the requirements set forth in *Towler* with the evidence presented at trial.

Petitioners do not challenge *Towler's* principles here and did not challenge them below. Instead, petitioners argue that the Court of Appeals misapplied its own decision in *Towler*.[7] *See* Petition, at 21-22. In fact, the Court of Appeals applied *Towler* and rejected petitioners' contention that Bouchat's proof was no more than a "tortuous chain of hypothetical transmittals". The Court, relying on *Towler* and consistent with the Second Circuit decision in *Gaste,* 863 F.2d

[7]Petitioners also contend that the decision is in conflict with this Court's description of the law governing reasonable inferences set forth in a personal injury case involving a train accident. *See* Petition, at 19, citing *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 340-41 (1933).

at 1066 and the Seventh Circuit decision in *Selle*, 741 F.2d at 900-901, rejected "mere 'speculative reasoning' as a basis for proving access, especially when intermediaries are involved." *See* Pet. App.5a. The Court found sufficient facts in the record independent of striking similarity to support the jury's inference of a reasonable possibility of access based on the concurrent, close relationships and a channel of communication linking the intermediaries and the alleged copiers. *See* Pet. App. 4a-7a. The district court judge who presided over the lengthy trial reached the same conclusion. Pet. App. 46a-48a. By contrast, the dissent below, upon which petitioners rely heavily, urged that the majority had misapplied *Towler* to the facts of this case. *See* Pet. App. 12a-14a ("I simply cannot agree with the majority's conclusion that this evidentiary record establishes that the defendants copied Bouchat's shield drawing."). This dispute over the sufficiency of the evidence does not raise a question of law, compelling this Court's attention. Further, the policy concerns raised in the Petition are not present in this case at all because Bouchat produced substantial and credible evidence that he created his Ravens shield drawing well prior to the selection of the team's name, and well in advance of the petitioners' design process.[8]

B. PETITIONERS' EVIDENCE WAS CONTRADICTED, IMPEACHED AND REJECTED BY THE JURY

The Petition is based on the testimony of interested witnesses for the defense and a misleading argument that their testimony was direct, uncontradicted and unimpeached. The argument is squarely at odds with the presumption of copying created in Bouchat's favor that petitioners do not challenge. Petitioners' witnesses, however, were impeached and

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[8]Bouchat's prior creation witnesses went uncontradicted during the trial; and they are not mentioned in the Petition.

contradicted; and the record reflects that petitioners' witnesses do not support petitioners' bald denial of access. *See Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149-51 (2000)(a "court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'"), *quoting* 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 299 (2d ed. 1995). Petitioners did not base any Rule 50(a) motion on the testimony of their own witnesses, and simply have not preserved the contention they urge upon this Court.

Petitioners were unable to establish independent creation of their work. Petitioners' design appeared from out of nowhere less than two weeks after Bouchat's fax was sent to Moag. Petitioners' designers, who were working under extreme time pressures, had no preliminary design work that resembled the shield design prior to Bouchat's fax, without, as the district court observed, "a good deal of literary license." Pet. App. 52a & n.24. Kim, the project's head designer, acknowledged at trial that on approximately 77 occasions during her deposition, she was unable to answer questions concerning the dates, times and sequences of design development or to explain the source of "her" design. Osaki, another NFLP designer, was similarly impeached. JA. 630-39, 644-703, 746-69. The jury reasonably could have concluded, therefore, that Kim and Osaki had no independent recollection concerning the chronology of their work product and that their testimony at trial was based on computer files that Bouchat established were not trustworthy and contained suspicious irregularities and discrepancies concerning dates and times of last modification. JA. 1096-1128, 1133-44, 1151-52.

Both Kim and Osaki acknowledged that they photocopied bird books from a public library, scanned them into NFLP computers and incorporated the same images into

commercial presentations made to David Modell for the logo project. Paula Guibault, NFLP in-house counsel, testified that such activity would violate the NFLP insulation policy. Bruce Burke, NFLP's creative director, testified that it would cause him "lots of concern" if NFLP designers scanned silhouettes from published works in a public library into their computers and then incorporated them into presentations made to David Modell. Clearly, however, this is what the NFLP designers did. JA. 1547-50, 1596-97, 1600-02, 1606-09, 1612, 1620-22, 1632, 1637, 1639, 1725-1747A.

Petitioners point to various individuals who testified for the defense that they did not see Bouchat's drawing. But petitioners did not present such testimony from all the persons in the channel of communication or from those persons whose jobs necessarily would have involved the handling of the fax, such as, for instance, the receptionist at the law firm. Moag testified that he did not recall seeing it. Pet. App. 76a, 78a. On cross-examination, he also conceded and displayed that he had a poor recollection of the events. JA. 966, 968-69, 975-76. Moag testified that he did pass on design submissions to Modell for political reasons, which was why the meeting with Bouchat took place. Pet. App. 76a. Petitioners point to the testimony of Beth Henry, Moag's secretary, who stated that outside submissions were placed in a separate folder, and that Bouchat's drawings were not contained in that folder. An examination of the file to which Henry made reference, however, reflects that there were only three drawings in the entire file, not the numerous submissions of artwork from the public that Moag testified he had received. Moreover, if Bouchat's drawings had been passed on, they would not have remained in Moag's file.

Petitioners also point to David Cope's testimony to support the proposition that no artwork was forwarded to NFLP after April 1, 1996. While testifying that he had certain supervisory duties related to the intake of submissions from the public, Cope testified that he was not involved in the routine,

day-to-day handling of the vast number of submissions from the public. He also testified that he did not begin his full-time duties with the Ravens until approximately March 18, 1996 and he had no involvement with submissions of artwork when he first began his duties. Cope testified that the team did not start sending back submissions from the public until April 4, 1996, a few days after Bouchat faxed his works to Moag on April 1 or 2, 1996. JA. 1036-38.

Petitioners argue that MSA conducted a search of its files, which revealed that Bouchat's fax never was received and forwarded to the team. There was no evidence, however, that MSA kept or had any reason to keep a copy of any of the many submissions of artwork that it received from members of the public. Nor would MSA personnel have any reason to recall a particular submission given the volume of submissions that it received.

Petitioners point to the testimony of Paula Guibault for the proposition that it was NFLP's policy that its creative people were not to look at unsolicited submissions from the public. Guibault, who became an NFLP employee in February 1996, testified that she memorialized this policy in a March 11, 1996 memorandum, which was circulated to NFLP executives. While she testified in general terms that this policy was made known to some corporate executive officers, there was no testimony that the policy was implemented or enforced. There was no testimony that Kim or Osaki were familiar with this policy, or that they followed it. There was no testimony that the policy was given or explained to the designers or what steps were taken to ensure that its terms were followed. Guibault, significantly, did not testify how, in fact, the drawings received from the public were processed. Guibault was unaware of the practices followed by NFLP designers, including their copying of drawings from copyrighted bird books, and did not testify that she conducted any audit or inspection of their practices in general, nor did she search for Bouchat's work. JA. 1045-53,

1055-57. Contrary to this policy memorandum, David Modell wrote letters to members of the public from whom he received artwork, stating that he would pass it on to NFLP. JA. 1581, 1588. This evidence suggested that no policy of insulation was established or followed by NFLP. Cope's testimony that Ravens personnel looked at submissions from the public was evidence that the insulation policy was not being followed. JA. 1043-44, 1916.

The denials of access by Kim, Osaki, Burke and David Modell at trial were so similar in content and theatrical in attitude that the jury reasonably could draw the conclusion that their testimony was rehearsed and staged, particularly given testimony that their "witness coach" and jury consultant was present in the courtroom throughout the trial. The emotions of petitioners' witnesses appeared to be turned on and off as if on cue. Their finger-pointing denigration of Bouchat also gave the impression of a rehearsed performance rather than truthful testimony. When combined with documentary evidence of the existence of a "party line" in the Ravens' dealings with the outside world in similar situations, it was reasonable for the jury to have an unfavorable view of the credibility of these witnesses. JA. 704-07, 770, 865-69, 926-27, 1081-83, 1518.

C. THE PETITION CONTAINS NUMEROUS MISSTATEMENTS OF THE RECORD

The Petition contains misstatements of the record and proceedings below. Petitioners ignore virtually all of Bouchat's evidence and the reasonable inferences that must be drawn in his favor. *See Reeves*, 530 U.S. at 149. Instead, petitioners select snippets of the evidence and twist them to their favor. For instance, the Petition is premised on a factual theory that Bouchat created the Garrett drawing (Pet App. 67a), an unregistered work, in December 1995, and then modified it

after he saw the Ravens logo in June 1996.[9] Petition, at 7, 9-10. Petitioners' factual hypothesis concerning the Garrett drawing was not advanced at trial and first appeared in this case in petitioners' brief in the Court of Appeals. The Garrett drawing was part of Bouchat's work-in-progress that he presented at trial, and petitioners never challenged it as such. Petitioners' arguments concerning the Garrett drawing, coupled with the depiction of the various works in the body of the Petition, at 7-9, taken out of their chronological sequence, are misleading. The evidence at trial clearly established that Bouchat created the Garrett drawing (Pet. App. 67a) AND afterwards the exact shield design at issue (Pet. App. 69a) on or before December 5, 1995, before the petitioners' design process even began in late March 1996. It was also established that Bouchat sent his shield design to the MSA at the earliest stages of the NFLP design process, on April 1st or 2nd, well before Bouchat could have had access to petitioners' logo. Pet. App. 41a, 52a.

Petitioners depict a November 1995 sketch of a helmet by Bouchat and incorrectly state that Bouchat presented this drawing to Moag on March 28, 1996. *See* Petition, at 12. In fact, Bouchat presented Moag an actual miniature helmet with a finished Ravens' decal design, albeit similar to the preliminary drawing (Pet. App. 71a) that Bouchat created in November 1995. The State Information Officer photographed Bouchat and Moag with the helmet in Moag's office. Pet. App. 76a-78a. Similarly, petitioners' characterizations of Bouchat's

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[9]Petitioners incorrectly state that Bouchat claimed that the so-called Garrett drawing (Pet. App. 67a) was the first drawing that bore similarity to the shield drawing. It was part of Bouchat's work-in-progress leading up to his finished work. Pet. App. 69a. It was not the beginning or the end of the progression of drawings leading up to Bouchat's final shield drawing. In early December, Bouchat gave Lena Garrett, a secretary in the building, this drawing. Garrett testified that she also saw Bouchat's finished shield drawing around this same time. JA. 768-69.

artistic skills and background are not only uncharitable, but they are inaccurate.

Petitioners state that the district court noted that the wings on the Bouchat "shield drawing" reflected a much higher level of artistic skill. *See* Petition, at 9. The district court, however, was clearly referring to the wings on the "bird drawing," another drawing in the case, and specifically used that term, not the term "shield drawing." Pet. App. 73a. The district court carefully distinguished the term "bird drawing" from the term "shield drawing," the one at issue on this appeal. Pet. App. 39a & n.5. Petitioners also state that the jury found against Bouchat on the issue of access on two of the three drawings. This is a misstatement. The special interrogatories posed to the jury asked whether Bouchat proved by a preponderance of evidence that he created in 1995 the same exact drawing as was attached to his copyright application and whether he had proven that he had faxed the same exact drawing attached to his copyright application. It was only with respect to the shield drawing that the jury answered in the affirmative. Pet. App. 49a-51a.

Petitioners state that Bouchat's expert, Anders, testified that there was an identifiable process and development of Ravens logos by the NFLP designers. Anders, however, actually testified that Kim's preliminary sketches had nothing to do with the designs in issue. Anders testified that the NFLP design work product did not reflect a developmental process and contained significant gaps.[10] JA. 154-55, 169, 174-75.

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[10]On cross-examination during *voir dire*, Anders testified that certain Asian countries consider it a sign of respect to copy. Petitioners now appear to claim prejudice from this testimony. *See* Petition, at 15n2. Yet petitioners' counsel did not request a mistrial, and they continued to come back to Anders' comment throughout the trial as part of their trial strategy, including incessant cross-examination after Anders' testimony in chief, in an unfair attempt to portray Anders as a racist.

Petitioners' own expert, Ziegler, testified that it was impossible to determine from petitioners' work product the sequence and chronology of their work. JA. 1000-01.

D. THE ISSUE OF STRIKING SIMILARITY IS NOT FAIRLY PRESENTED BY THIS CASE

The district court did not instruct the jury on striking similarity, and the question certified to the Court of Appeals concerning striking similarity was posed in the alternative in the context of the basic issue dealing with sufficiency of the evidence. Pet. App. 61a. Petitioners did not request an instruction on striking similarity and did not object to any argument to the jury based on the similarity of the works. The Court of Appeals found that Bouchat had established a reasonable possibility of access, independent of the degree of similarity of the two works. Pet. App. 8a-9a. As a result, that portion of the decision addressing the doctrine of striking similarity (Pet. App. 8a-9a) was not essential to the judgment of affirmance, and would not result in reversal.[11]

E. PETITIONERS DID NOT OBJECT TO THE JURY INSTRUCTION THEY NOW ASSERT WAS COERCIVE

Petitioners claim error from a coercive jury instruction, a small portion of a so-called "Allen" charge, but petitioners' counsel did not object to the instruction before the jury retired. Pet. App. 89a-90a, 93a, 95a. It is obvious that this argument

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[11]The dissent, given the majority's decision on the first certified question and the interlocutory nature of the appeal, was of the view that the Court should not have answered the striking similarity question, as it was conditioned on there being insufficient independent evidence of a "reasonable possibility of access." Pet. App. 25a, 61a.

poses no significant issue warranting this Court's attention; in any event, it was not preserved for appellate review. *See* Fed.R.Civ.P. 51.

CONCLUSION

The Court of Appeals, and the district court, determined that the evidence presented at trial generated a jury question on whether Bouchat proved "reasonable possibility of access." After summarizing that evidence, the Court of Appeals concluded, "there is evidence counter to the above, but such a conflict in evidence presents the classic jury issue, and the jury's resolution of that issue was for the plaintiff." Pet. App. 7a & n. AI. This case presents no fundamental questions of copyright law, or any conflict among the Courts of Appeals. The Petition should be denied, and the case returned to the district court for a trial on damages.

Respectfully Submitted,

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PLAINTIFF'S TRIAL EXHIBIT 1
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